

E409VILS

Sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

05 CR 621 (RJS)

5 GARY ALAN TANAKA AND ALBERTO
6 WILLIAM VILAR,

7 Defendants.

-----x

8 New York, N.Y.
9 April 24, 2014
10 9:51 a.m.

11 Before:

12 HON. RICHARD J. SULLIVAN

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
17 Southern District of New York

BENJAMIN NAFTALIS

JUSTIN ANDERSON

18 Assistant United States Attorneys

19 FREDERICK H. COHN

20 Attorney for Defendant Gary Alan Tanaka

21 VIVIAN SHEVITZ

YING STAFFORD

22 Attorneys for Defendant Alberto William Vilar

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1 (In open court; case called)

2 MR. NAFTALIS: Good morning, your Honor.

3 Benjamin Naftalis, Justin Anderson and Sharon Cohen
4 Levin for the government.

5 THE COURT: Good morning to each of you.

6 And for the defendants.

7 MS. SHEVITZ: Vivian Shevitz and Ying Stafford for
8 Mr. Vilar.

9 THE COURT: Good morning to each of you.

10 Mr. Vilar, good morning.

11 MR. COHN: Fred Cohn and Angela Lipsman, my associate,
12 for Mr. Tanaka.

13 THE COURT: Good morning to each of you.

14 And Mr. Tanaka, good morning to you.

15 We have a number of others here today; some I
16 recognize. I think there are some victims who wish to be
17 heard. They'll have that opportunity.

18 Let me welcome all who are here. This is a public
19 courtroom so everybody is welcome here but I thank those of you
20 who took the time to be here today.

21 We're here for sentencing. I apologize for the late
22 start. I was just collecting my thoughts and collecting my
23 papers which takes a little time in a case like this. I
24 decided to have the sentencings go forward together just
25 because there's so many overlapping issues and motions and

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1 arguments that are joined by the two defendants. It struck me
2 as sort of unfair to have somebody go second where, you know,
3 all -- much of the decision-making would have been done by the
4 time the second person went. So I thought we'd do it this way.
5 I'm very mindful, of course, that I'm sentencing two
6 individuals. And I'll keep that in mind throughout. But I
7 just want to make sure that's okay with all of you.

8 MR. COHN: That's the only way to fly as far as I'm
9 concerned.

10 THE COURT: I think that's right.

11 Good. I should also mention occasionally we have
12 school groups come in and out of the court. So, the district
13 executive told me there is a group I think coming from Midwood
14 High School at some point today. If they come in -- you're
15 already here. Welcome. So I thought you were going to be here
16 at 10:00. Well, welcome. You're welcome here as well. So
17 thanks for being here early.

18 So I want to go over with the parties what I've
19 reviewed in connection with sentencing. And, of course, let me
20 know if I've left anything out. This is a case with a lot of
21 history. And so I have reviewed everything from the prior
22 sentencing. I stated on the record what that was. I don't
23 think I need to restate it. That includes the sentencing
24 submissions from the defendants and the government. It
25 includes numerous letters. It includes trial testimony. We

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1 had a hearing. There was hearing testimony. So I've reviewed
2 all of that again.

3 I've also reviewed the transcript from the last
4 sentencing hearing. I have rereviewed portions of the
5 transcript from the criminal trial. I've reviewed, of course,
6 the Second Circuit's opinion in the appeal in this case, U.S.
7 v. Vilar which is at 729 F.3d 62.

8 And then I just want to go over quickly what I've
9 reviewed that has been submitted more recently in connection
10 with the resentencing. I have reviewed, of course, the
11 government's submission of March 31, which is a 16-page
12 single-space submission with a number of attachments. I've
13 reviewed that.

14 I have reviewed also the government's April 1
15 submission with respect to forfeiture. That is a 6-page
16 single-space submission with a preliminary order of
17 forfeiture/money judgment that is proposed and attached.

18 I have reviewed the Rule 33 motion filed by
19 Ms. Shevitz that is joined by Mr. Tanaka. I guess that was
20 dated April 14.

21 I have also reviewed the sentencing memoranda of
22 Ms. Shevitz and Ms. Stafford on behalf of Mr. Vilar. It's an
23 80-page, double-space submission.

24 I've also reviewed the April 14 sentencing submission
25 from Mr. Cohn which is a 7-page, single-space submission,

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1 includes attachments. Among them is a 12-page, single-space
2 letter from Mr. Tanaka's wife, Renata, as well as a letter from
3 his mother that I've read. I thank them for taking the time to
4 write.

5 I have reviewed an April 21 letter, one sentence
6 letter from the government just indicating the attachment of
7 the victim impact statement from Ms. Graciela Lecube-Chavez,
8 which I've read.

9 I then have a letter that I received from Mr. Begos on
10 behalf of the Mayers in connection with the SEC matter that I
11 issue an order asking the parties to just respond to
12 attachment. So I received an April 23 letter from the
13 government on that subject.

14 I think there's a reference to a trial transcript
15 page. I think it's actually inaccurate. I think it should be
16 trial transcript page 1385 to 1368 not 1285 to 1268, a one-page
17 letter.

18 I then have an April 23 letter from Ms. Shevitz which
19 is also a one-page letter.

20 I then received late yesterday afternoon government's
21 reply memorandum dated April 23. It's a 7-page, single-space
22 letter with a variety of attachments.

23 Then I also received a response to that by Ms. Shevitz
24 dated April 23 as well. It's a 3-page response.

25 I should say that I didn't authorize any reply

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1 memorandums here. So you should have checked with me first. I
2 have read these submissions. They haven't altered my view on
3 anything. I've been thinking about this for a while. So the
4 issues addressed haven't altered my conclusions or at least my
5 tentative conclusions on those things. So, I've read them.
6 They're part of the record. But I did think that was worth
7 pointing out.

8 I've also, I guess, reviewed materials from the SEC
9 case that are publicly docketed that I may reference as we go.
10 But there is a related SEC case that has spawned a lot of
11 submissions from counsel here and others and I'm familiar with
12 that case. I'm presiding over it. And I've reviewed a number
13 of submissions in connection with that case as well.

14 Are there any other submissions or things that I've
15 overlooked?

16 Ms. Shevitz?

17 MS. SHEVITZ: Mr. Cohn's response to your order
18 yesterday. I don't think you mentioned that.

19 MR. COHN: It's hardly relevant, Judge. I said that
20 the thing that you were asking us to submit to was out of time
21 and that was my response.

22 THE COURT: Right.

23 MR. COHN: And if that affects your sentencing, I'm
24 checking out.

25 THE COURT: All right. I should have mentioned that.

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1 But thank you.

2 MS. SHEVITZ: I'm just wondering whether we could
3 identify the documents by the ECF filing numbers as opposed to
4 how many pages they are just to make the record extremely
5 clear.

6 THE COURT: To go back over the documents I just
7 mentioned by the ECF filing number?

8 MS. SHEVITZ: My cocounsel thinks that that's
9 unnecessary.

10 MR. COHN: I think it's burdensome actually.

11 THE COURT: I'll agree that it's burdensome. I think
12 I'd have trouble probably doing that just because I haven't
13 scribbled it. But everything has been docketed, I believe, so
14 I think it's all pretty clear.

15 Government, anything that I've left out?

16 MR. NAFTALIS: Not that we're aware of, your Honor.

17 THE COURT: All right. So, let me start with the Rule
18 33 motion. I've reviewed the parties' submissions on that. So
19 I'm prepared to rule. If anybody has anything they want to say
20 now before I do, I will give you an opportunity. But I think
21 you've made your arguments and your points.

22 Anyone?

23 MS. SHEVITZ: Are you saying you're prepared to rule?

24 THE COURT: On the Rule 33.

25 MS. SHEVITZ: The substance of the motion now?

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1 THE COURT: I'm prepared to rule on the motion.

2 MS. SHEVITZ: Okay.

3 MR. NAFTALIS: Nothing from the government aside from
4 what we've already written, your Honor.

5 THE COURT: I find the motion is untimely, in fact
6 very untimely. Rule 33 requires motions to be submitted within
7 14 days of conviction or three years after conviction if based
8 on new evidence. Either way the deadline has long passed. I
9 fine that there is no excusable neglect for the delay. The
10 defendants have been making many of these same or similar
11 arguments for years. They've had access to all the relevant
12 documents for the entire period. So I'm going to deny the Rule
13 33 motion.

14 That doesn't prejudice the defendants' ability to
15 bring a 2255 on at least some of the issues, and that was
16 referenced also in the Circuit's opinion. But the Rule 33
17 motion I'm going to deny. Okay.

18 MS. SHEVITZ: Your Honor, we did say in the motion
19 that it's alternatively broad under 2255.

20 THE COURT: I'm not going to resolve the 2255 now.
21 I'm just ruling on the Rule 33.

22 MS. SHEVITZ: Okay.

23 THE COURT: I now want to just go back to the
24 presentence reports. I didn't order new presentence reports in
25 this case. I think the parties have had opportunities to

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1 review the old presentence reports. They've made objections to
2 them and developed a full record in relation to the presentence
3 reports. I just want to make sure, Mr. Cohn, you weren't here,
4 Ms. Shevitz you weren't here at the last sentencing, but you've
5 reviewed the presentence reports and discussed them with your
6 clients?

7 MR. COHN: I have reviewed it, your Honor. Your order
8 appointing me -- your order said that there would not be a new
9 presentence report. I did challenge, due to the appeal and the
10 ruling of the Second Circuit, two levels that the presentence
11 report assigned at the last hearing and I dealt with that
12 separately and I don't know whether that was a challenge to the
13 prior report or not. But that's the only issue that I have
14 with the report.

15 THE COURT: Look, I think there are a number of
16 arguments that have been made about the report and the proper
17 application of the sentencing guidelines. We'll talk about
18 that in a moment.

19 Ms. Shevitz you've reviewed the presentence report
20 with your client and discussed it?

21 MS. SHEVITZ: Yes.

22 THE COURT: And I think -- I'm confident but you tell
23 me if you're less confident that objections to the presentence
24 report, to the conclusions and findings in that report have
25 been developed as part of your sentencing submissions? Is

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1 there anything else you'd like to say with respect to the
2 presentence report that isn't in your submissions? Let me put
3 it that way.

4 MS. SHEVITZ: I have to think about that.

5 Not really, except that a presentence report with so
6 many conclusions that are not accurate really shouldn't be
7 following the defendants into an institution. That's my
8 objection to that.

9 THE COURT: So let me remind Mr. Vilar and Tanaka
10 about the different factors that a court has to take into
11 consideration. And this is for everyone, I guess. Judges are
12 required to consider different factors or objectives of
13 sentencing. And I went through them at the first sentencing
14 that we had.

15 Among those factors are the history and
16 characteristics of the defendants. I have to consider each of
17 you as individuals. And your entire lives. Not just this
18 crime. I have to take into account all that you've done, good
19 and generous and in between and bad, everything. Everybody's
20 complicated. And that it's important to look at the entire
21 person and to sentence a person based on their entire life.

22 I also have to consider the facts and circumstances of
23 these crimes. Not just what the crimes are named; the actual
24 details of what took place, over how long a period of time, who
25 did what to whom. And it's important that the sentence imposed

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1 reflects and -- well reflects the seriousness of the crime and
2 promotes respect for the law and provides a just punishment for
3 the crime.

4 I also have to consider another factor that's related
5 but I think different and that's the need to deter or
6 discourage you and others from committing crimes like this in
7 the future. The notion there is that a judge in imposing a
8 sentence sends a message and the message, hopefully, that is
9 received by the defendants but also by a larger public is that
10 crime doesn't pay, that it's not worth engaging in criminal
11 conduct and that people might be discouraged and there will be
12 less crime in the future. That's the hope. It's sometimes
13 hard to predict. It's kind of speculating in some ways about
14 future conduct. But Congress has said that courts should
15 consider this. I think most of us recognize that there's
16 something to that. So that's a factor that I also have to
17 consider.

18 I have to consider your own needs while you're in
19 custody. Each of you have health issues and those are things
20 that have to be addressed. Many defendants have other issues
21 that also need to be addressed while they're in custody and
22 judges should take that into account.

23 I need also to consider the United States Sentencing
24 Guidelines, and I think you're probably familiar with those by
25 now. Others here may be less familiar. The Sentencing

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1 Guidelines are a big book that is put out by a commission, and
2 that's a commission that includes some judges and lawyers and
3 experts in the field. And the way it works is that a judge
4 like me is directed to look to that book for guidance. It's
5 not a mandatory guideline but it's -- it's something the courts
6 are directed to look to and consider.

7 And the way it works is that every crime or type of
8 crime has a chapter or chapters in that book. And the judge is
9 directed to go to the proper chapter and make certain findings
10 of fact and, based on those findings of fact, assign points.
11 And it becomes a fairly mathematical exercise of adding and
12 subtracting. And on the basis of that adding and subtracting,
13 the judge comes up with a number. And that number is referred
14 to as the offense level. The judge then does a different
15 calculation under a different chapter in the book that relates
16 to criminal history and that's, generally speaking, so that
17 people who have prior convictions and have previously been
18 engaged in crime are typically going to be treated more harshly
19 than people with no prior convictions.

20 So the judge goes through, finds if there are any
21 prior convictions; if so, when they were, for how long, and
22 does another exercise of adding points and comes up with
23 another number. And that number is referred to as the Criminal
24 History Category. There are six criminal history categories.
25 Category I is the lowest. Category VI is the highest.

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1 Then on the basis of those two numbers, the offense
2 level on the one hand and the Criminal History Category on the
3 other, the judge goes to the back of this book where there's a
4 grid, a table, and simply goes down this column which is the
5 offense level and across these columns which are the criminal
6 history categories. And where they intersect that's the spot
7 that in the view of the commission would be the appropriate
8 sentence according to this book.

9 Now a judge is not required to follow the book. But
10 that's usually where sentencing begins. The judge starts
11 there, makes findings under the guidelines and then we go back
12 and talk about these other factors.

13 I guess the last factor that judges are asked to
14 consider is the need to avoid unwarranted disparity in the
15 sentence of defendants in one case as opposed to other
16 similarity situated defendants. And that's simply the sense
17 that it's important for a judge to take a step back and make
18 sure the sentence imposed in one case is not wildly out of line
19 with what is imposed in other cases that are similar with
20 defendants that are similar, recognizing no two cases are
21 exactly alike and no two defendants are exactly similar.

22 So those are the factors that I have to consider and I
23 have to weigh them and balance them. And sometimes that's a
24 tricky process because some of these are in tension with each
25 other.

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1 We're going to start now with the guidelines
2 calculations. Once I've done that, I'll then ask the lawyers
3 if they wish to be heard beyond what they have submitted. I
4 will give them a chance to address any of these other factors
5 that they think relevant. I will give the government a chance
6 to respond. I'll then give the victims an opportunity to speak
7 if they wish. And then finally I will give each of you an
8 opportunity to speak. You have a right to speak. You're not
9 required to but you're certainly welcome to and, as I said, you
10 have a right to. So I will give you that opportunity.

11 Ms. Shevitz.

12 MS. SHEVITZ: Judge, I need to backup for a minute
13 because when you asked if the defendants had read the
14 presentence report, yes, but they did not see yesterday's
15 submission by the government.

16 THE COURT: Yesterday's.

17 MS. SHEVITZ: At all. The one that came in last night
18 at 5:00 yesterday, they did not see that.

19 THE COURT: All right. Well if you want them to take
20 a look at that now you can. As I said, it's not going to have
21 a material impact on my sentence. But if they want to take a
22 few minutes to read it, it's about seven pages long, so they
23 can do that. As I said, I didn't give any permission to file a
24 reply and so I hadn't expected it either. But it shouldn't
25 take too long to read.

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1 Do you want to do that? Mr. Cohn, do you?

2 MR. COHN: I take your representation that it doesn't
3 affect your sentence at all at face value and therefore I don't
4 care.

5 THE COURT: Ms. Shevitz.

6 MS. SHEVITZ: I don't know if it affects your Honor's
7 decision or not in reality, and I'd just like to have my
8 clients at least read what's here before they're sentenced.

9 THE COURT: You can take a look. That's fine.

10 (Pause)

11 MR. COHN: Your Honor, with respect, if they're 'going
12 to read the seven page, single-space document I don't know that
13 you want to sit there while they do it.

14 THE COURT: We can take a short break if you'd like.

15 MR. COHN: Well it's up to you, your Honor.

16 THE COURT: We'll take about a ten-minute break.

17 MR. COHN: I've been through Mr. Tanaka's reading of
18 stuff. He's very thorough and it takes some time. And I just
19 want to advise the court that you might find it more convenient
20 for you, not for me, that if you want to leave the bench until
21 we're ready.

22 THE COURT: That's fine. So we'll take --

23 MS. SHEVITZ: I apologize but I have not had an
24 opportunity to review this with them.

25 THE COURT: You don't have to apologize. That's fine.

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1 Your client is in custody so it's harder to get in things than
2 would otherwise be the case. So that's fine if you want to
3 take a minute or a few minutes to do that.

4 MS. SHEVITZ: Thank you.

5 THE COURT: We'll take a short adjournment. All
6 right. About ten minutes I expect should probably be
7 sufficient. Thanks.

8 (Recess)

9 THE COURT: So defendants have had a chance to read
10 the government's reply.

11 So let's go forward then with the sentencing
12 guidelines. I'm going to make my findings under the
13 guidelines. There is no dispute -- first of all, there are
14 twelve counts in the indictment. Mr. Vilar was convicted on
15 all twelve; Mr. Tanaka on three.

16 Each of the counts should be grouped together for
17 guidelines purposes and so there is no dispute that the base
18 offense level is level 7 pursuant to section 2B1.1(a)(1) of the
19 guidelines.

20 The next enhancement relates to loss. There is a
21 table under section 2B1.1 that relates to the amount of loss in
22 the fraud. In 2010, I found that the total was about \$22
23 million in loss, which therefore yielded a guidelines increase
24 of 22 levels.

25 This time around the defendants are arguing that there

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1 is no loss or alternatively that the only loss is the lost
2 interest from 2003 or 2004 to 2005 on the ground that the money
3 to pay investors was never lost because it was always in
4 Amerindo's accounts.

5 Although the defendants argue that they're focusing on
6 loss amounts instead of credits against loss or deductions from
7 loss, this is really the same argument that was raised last
8 time. I think it's the same argument that was raised on
9 appeal. I reject it for the same reasons that I rejected it
10 before and for the same reasons that the circuit gave when it
11 rejected this argument on the appeal. I also don't agree that
12 as a factual matter that there were always sufficient assets to
13 pay investors. But I think that's not even relevant for
14 purposes of calculating the loss.

15 So with respect to the loss, my calculations are as
16 follows. There was Graciela Lecube-Chavez, the government
17 wants to use the same amount of loss as was found in 2010,
18 which is equal to the unpaid balance left in her account. The
19 defendants didn't raise any specific objections to this amount
20 other than to say that it should be zero or close to zero. So
21 I find that the amount is proper -- is appropriately
22 \$48,434.12.

23 With respect to the Mayers, again, the government
24 wants to use the loss amount that was used in 2010 which was
25 equal to the Mayers last investment in the GFRDA account in

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1 2001. Now the Court has recently received a letter from the
2 Mayers' attorney containing a more recent statement from June
3 of 2004 showing a balance of \$11,224,936.46. From trial
4 testimony, including Tanaka Exhibit FZ, this appears to be a
5 statement that was faxed from Renata Tanaka to the Mayers in
6 August of 2004. That amount includes interest that accrued
7 over time. But as the circuit -- Second Circuit has held in
8 United States v. Hsu, at 669 F.3d 112 at 120 through 122, a
9 case that was cited approvingly by the circuit in the Vilar
10 appeal, "When investors are told that their account has accrued
11 interest, that interest counts towards loss." So to be more
12 consistent with the Lecube-Chavez calculation, it seems
13 appropriate that the calculation here should be the amount of
14 the last statement perhaps minus subsequent distributions.

15 Now from the SEC case and from trial testimony in this
16 case, we know that the Mayers received a little over \$800,000
17 from Amerindo between June of 2004 and May of 2005. The
18 documents supporting those distributions can be found in the
19 declaration of Neal Jacobson in the SEC case at docket number
20 333, Exhibit F, which the defendants had an opportunity to
21 respond to in the SEC case, and also Lisa Mayer testified about
22 these payments at the trial, and that testimony is in the trial
23 transcript at pages 1292 to 1297.

24 So, I think it could be argued that subtracting those
25 distributions from the statement amount would be appropriate,

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1 although one could argue, frankly, that the credit shouldn't be
2 deducted since it was paid after the Mayers had realized that
3 something was wrong in Amerindo and were already considering
4 legal options. And I'll refer the parties to Section 2B1.1,
5 application note 3(E)(i), which says that money returned
6 shouldn't be counted towards loss if it was returned to the
7 victim before the offense was detected, and then defines what
8 that means. So, that doesn't really matter for purposes of
9 loss. I find that the amount is \$10,418,089.98. But whether
10 it's eleven million or ten-and-a-half million doesn't really
11 affect the loss calculation.

12 With respect to Lily Cates. Again, the government
13 wants to use the same loss amount as in 2010. In reviewing the
14 presentence report, the submissions in the SEC case and the
15 trial testimony, I find that \$500,000 from the SBIC investment
16 was transferred to the Lawrence Appet Trust at Ms. Cates's
17 direction. And I think evidence of that transfer can be found
18 in the Jacobson declaration in the civil case at, again, docket
19 number 333, Exhibit C, and in the presentence report at
20 paragraphs 39 and 43. Since that money was returned to Cates's
21 control before disclosure of the fraud, I think that should be
22 deducted from loss. So for Lily Cates I calculate loss to be
23 \$9,270,133.85. And I find that this loss applies to both
24 defendants even though Mr. Tanaka was acquitted at trial on the
25 substantive count relating to this transaction. I find that,

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1 first of all, Mr. Tanaka was convicted of the conspiracy and
2 the investment adviser fraud counts. I also find by a
3 preponderance of the evidence that Mr. Tanaka was involved in
4 that fraud and certainly under Second Circuit precedent United
5 States v. Vaughn, 430 F.3d 518 at 527 courts may consider
6 acquitted conduct in sentencing. So, that amount will apply to
7 Mr. Tanaka as well as to Mr. Vilar.

8 Now the government doesn't seek to include loss for
9 Tara Colburn or Robert Cox, presumably because the circuit
10 didn't explicitly find that they were in America when their
11 transactions were engaged in. I've since, however, granted
12 summary judgment to the SEC in the civil case finding that both
13 of those investors were in America when they invested and I now
14 find by a preponderance of the evidence that they were both in
15 America. That is both for the reasons set forth in the summary
16 judgment reconsideration opinion, in the SEC case, and based
17 also on the evidence at trial including Government Exhibit
18 3331-15, which is an application from Tara Colburn for her \$1
19 million GFRDA investment and it also listed her address at Los
20 Angeles. So for Tara Colburn I find the loss to be the same as
21 I did in 2010 which is \$936,371.78.

22 Robert Cox, I find the loss to be the same as last
23 time, which is \$105,825.55.

24 So that is a total loss, if you add them up, of
25 \$20,778,855.28.

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1 Now, there are numerous other GFRDA investors. Just
2 one minute. It could be argued that they too were victims.
3 The government made that argument at the last sentence. I
4 denied it finding there wasn't sufficient evidence in the
5 record to make those findings.

6 The government is no longer making that argument and
7 I'm not going to add any other GFRDA investors among the
8 victims or include their losses as part of the loss under the
9 sentencing guidelines. Certainly those investors will be able
10 to participate in any distribution in the SEC case. But I'm
11 not counting them as included in the loss.

12 So that yields a guidelines increase of 22 under
13 section 2B1.1(b)(1)(L).

14 MS. SHEVITZ: Judge.

15 THE COURT: Ms. Shevitz.

16 MS. SHEVITZ: The court of appeals said that on remand
17 the district court must decide what acts -- what acts
18 constitute the offense conduct for the purpose of calculating
19 the appropriate loss amount at sentencing. I'm reading from
20 729 F.3d at 67. And I ask the Court to state expressly what
21 acts constitute the offense conduct that support this loss
22 figure, these loss figures.

23 THE COURT: All right. I mean I'm relying on the same
24 evidence and the same conclusions that are set forth in my SEC
25 reconsideration opinion. So that's the basis for the finding.

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1 MS. SHEVITZ: But I don't know what -- I'm asking,
2 because the court of appeals directed that there be a finding
3 specifically on what acts constitute the offense conduct. I
4 don't believe those acts have been specified in anything. And
5 I think for this proceeding, so that I have a record, I would
6 like to ask the court to specify the acts that constitute the
7 offense conduct.

8 THE COURT: The acts are the --

9 MS. SHEVITZ: The acts.

10 THE COURT: The acts are the reaching out to those
11 victims and their investment in the GFRDA during the life of
12 the conspiracy while they were in the United States, which is
13 really I think what the focus was, whether or not this was a --
14 this presented a Morrison problem. So I think I've laid that
15 out in the SEC decision. If you disagree, obviously you can
16 take that up with the Court of Appeals. But I think -- I think
17 that should be sufficient.

18 MS. SHEVITZ: You won't -- there is no further
19 specification of the act because the Court of Appeals I believe
20 was asking this because there has to be a nexus between the
21 acts causing the loss and that's why the Court of Appeals said
22 on remand that the district court must decide what acts
23 constitute the offense conduct for the purpose of calculating
24 the loss. I still don't know how any specific act is related
25 to proximately causing any particular loss.

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1 THE COURT: All right. I think -- I think you and I
2 may disagree on that. I think I've made my record.

3 In any event, so that is the finding with respect to
4 the loss amount.

5 Now, there are other enhancements that the government
6 seeks. The government seeks a two-level increase under Section
7 2B1.1(b)(10)(B) because a substantial part of the scheme was
8 conducted abroad. The defendants argue that this increase
9 shouldn't apply because of the Supreme Court's decision in
10 Morrison. I don't agree. Where a victim is in America and the
11 perpetrator was abroad, there is no Morrison problem and
12 Section 2B1.1(b)(10)(B) is appropriate as an enhancement. The
13 application notes for 2B1.1 make clear that this increase is
14 about dealing with individuals who seek to avoid U.S. law by
15 operating abroad and I certainly find that that is what
16 happened here. So I do think that two-level enhancement is
17 appropriate.

18 The government seeks a four-level increase under
19 section 2B1.1(b)(19)(A)(iii) because the defendants were
20 investment advisers. The defendants I think concede as much
21 and don't object to this enhancement. I find it's appropriate.
22 So I will add a four-level enhancement for the defendants being
23 investment advisers.

24 The government also seeks a two-level enhancement
25 under 3B1.1(c) because the defendants were organizers, leaders

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1 in this criminal activity. The defendants argue that this
2 enhancement should not apply because the two of them were equal
3 partners in a two-person scheme.

4 I find that the defendants managed or supervised
5 Renata Tanaka who was a participant in the scheme and was an
6 unindicted coconspirator and that this enhancement is,
7 therefore, appropriate. I also note that arguably a four-level
8 enhancement under Section 3B1.1(a) would be appropriate because
9 the scheme was otherwise extensive and that it spanned many
10 years, was highly sophisticated, involved several of Amerindo's
11 offices and entities, and many of Amerindo's numerous employees
12 as unwitting participants. But I don't think I need to go
13 there. I think the two-level adjustment is appropriate and
14 sufficient under the circumstances.

15 So adding all of these up yields an offense level of
16 37 for both defendants.

17 Each of the defendants has no prior criminal history
18 so they're in Criminal History Category I.

19 So with an offense level of 37 and a Criminal History
20 Category of I, the guidelines range is 210 to 262 months, which
21 is about 17-and-a-half years to about 22 years. That's the
22 same guidelines range I found applied back at the sentencing in
23 2010. So, those are my findings with respect to the
24 guidelines.

25 Now while we're at it and while I've spent a fair

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1 amount of time talking about loss, I think it makes sense now
2 to talk about restitution and forfeiture, just because they're
3 similar but distinct calculations.

4 The government seeks restitution to the victims in the
5 amount of the loss for each victim plus 3.25% compounding
6 interest through 2013. The defendants have objected that there
7 shouldn't be any restitution because there isn't any loss.
8 I've already rejected that argument.

9 With respect to interest, I find that 3.25% is a
10 reasonable amount for prejudgment interest. Arguably the
11 higher IRS refund rate would be more appropriate. I had
12 previously ordered nine percent the last time. The Circuit
13 seemed to suggest without ruling that that might be high. So
14 I'm going to scale it back to 3.25% compounding.

15 That means that with respect to Graciela
16 Lecube-Chavez, I find restitution for the loss amount of
17 \$484,344.12 plus 3.25% compounding interest from 2005 to 2013.

18 For the Mayers, I find restitution for the loss amount
19 of \$10,418,089.98, plus 3.25% compounding interest from 2005 to
20 2013, minus the \$200,000 that has already been paid to the
21 Mayers as hardship payments under the SEC case.

22 For Lily Cates, I find restitution for the loss amount
23 of \$9,270,133.85 plus 3.25 compounding interest from 2005 to
24 2013. Again, I find that Mr. Tanaka is responsible for this
25 restitution because of his convictions on the conspiracy count

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1 and the investment adviser fraud count. And I refer the
2 parties to Title 18 of the United States Code Section 3664(a)
3 which provides that if a court finds that more than one
4 defendant has contributed to the loss of a victim, the court
5 may make each defendant liable for payment of the full amount
6 of restitution or may apportion liability among the defendants
7 to reflect the level of contribution to the victim's loss and
8 economic circumstances of each defendant. I also refer the
9 parties to United States v. Boyd which is 222 F.3d 47 at 51
10 which, again, recognizes a court may order a participant in a
11 conspiracy to pay restitution even on uncharged or acquitted
12 counts, substantive counts.

13 Because I find that Ms. Colburn and Mr. Cox were also
14 in America when they made their investments, I'm going to grant
15 them restitution. So I find restitution in the amount of
16 \$936,371.78 plus 3.25% compounding interest for Ms. Colburn and
17 \$105,825.55 plus 3.25% compounding interest for Mr. Cox.

18 Now since there is some recalculation here with
19 respect to the numbers and the interest compounding, I'm going
20 to direct the government to submit a proposed restitution order
21 and an affidavit setting forth the interest calculations by
22 close of business today.

23 With respect to forfeiture, the government is also
24 seeking forfeiture equal to the loss amounts. The defendants
25 raise a few objections. First, they argue that they have a

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1 jury right to determine forfeiture.

2 Did you want to say something about restitution?

3 MS. SHEVITZ: Yes, I do.

4 In the Razmilovic case, I think --

5 THE COURT: The case that's been cited, not
6 pronounced.

7 MS. SHEVITZ: Yes. I can't pronounce it. The court
8 there discussed how when money is frozen that is going to go
9 there with disgorgement, that it applies equally to
10 restitution. There is no money that's been earning interest.
11 Consequently, in that case, which we can't pronounce, the Court
12 said that it was not appropriate to award interest. We have
13 raised that again for the restitution issue. There is no money
14 that has been earning interest. The defendants have not been
15 able to earn interest. JP Morgan is earning interest. That's
16 the only one who is earning interest. So, I will object,
17 again, under that theory. It is impossible to pay interest
18 when there has been no way of earning interest on that money.

19 THE COURT: I think you made this point in your
20 papers.

21 Mr. Cohn, did you want to say anything?

22 MR. COHN: I just join in that.

23 THE COURT: All right. Government want to be heard on
24 that issue?

25 MR. NAFTALIS: Only if you want us to, your Honor. I

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1 think there was evidence put in in the SEC case that the
2 accounts were accruing interest, as I recall.

3 THE COURT: In any event --

4 MR. NAFTALIS: Regardless, I don't think that's
5 relevant to the question of the defendant -- the victims being
6 deprived of their funds, which is the point of restitution.

7 THE COURT: I think that there's a distinction between
8 disgorgement and restitution and I think that's the distinction
9 that Ms. Shevitz is blurring. In any event, I think the
10 objection is preserved. You've made your points. But that's
11 my finding with respect to restitution.

12 With respect to forfeiture, as I said, there are a
13 number of arguments that the defendants raise. First, they
14 argue that they have a jury right to determine forfeiture. I
15 reject that argument. I think it's counter to the Supreme
16 Court's holding in Libretti v. United States, 516 U.S. 29 at 48
17 through 49. I don't think Apprendi has undermined that case.
18 Certainly the Supreme Court hasn't held so. So until they
19 overrule it, I feel bound by it.

20 Second, the defendants argue that forfeiture should be
21 for profits not for gross receipts. The Second Circuit has
22 rejected that argument in United States v. Peters, 732 F.3d 93
23 at 102. So I reject it as well.

24 Third, the defendants say that the Court never entered
25 a preliminary order of forfeiture in violation of Rule

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1 32.2(b)(2)(B). That rule says that, "Unless doing so is
2 impractical, the Court must enter the preliminary order
3 sufficiently in advance of sentencing to allow parties to
4 suggest revisions or modifications before the order becomes
5 final as to the defendant."

6 Here, because we're doing a resentencing on a -- after
7 appeal, on a shortened timeline, I find that it was impractical
8 to do a new preliminary forfeiture order. In any event,
9 failure to enter a preliminary forfeiture order doesn't prevent
10 an entry of a forfeiture order as long as the defendants had
11 notice and an opportunity to respond. Here, I think the
12 defendants clearly had a full opportunity and notice, and, in
13 fact, did argue against the forfeiture. So I find that any
14 failure to enter a preliminary order of forfeiture was
15 harmless.

16 For forfeiture, Ms. Shevitz --

17 MS. SHEVITZ: Yes. Aside from Libretti, we argue that
18 there's a right to a jury trial on forfeiture under Rule 32--

19 THE COURT: No. You've preserved -- you've made that
20 argument. So you don't have to renew it each time. I mean I
21 disagree. But, so if you're just doing it to preserve your
22 appeal, you don't need to do that. If you think I've
23 overlooked something, then certainly --

24 MS. SHEVITZ: Well I didn't know if you overlooked it
25 because you had not discussed that as opposed to the Libretti

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1 point.

2 THE COURT: All right. So I've certainly reviewed the
3 materials and I think you and I disagree with respect to
4 whether you have a right to a jury trial on the forfeiture.

5 With respect to forfeiture, I find that the
6 appropriate amount is the full loss amount minus the \$200,000
7 that's already been paid to the Mayers. So that adds up to
8 \$20,578,855.28.

9 There is no interest on forfeiture.

10 So, I'm going to direct the government also to submit
11 a proposed forfeiture order reflecting that amount.

12 All right. I should also note to the extent that some
13 of the proceeds were obtained by the Amerindo corporations, I
14 find that the defendants indirectly obtained everything gained
15 by Amerindo because they entirely dominated and controlled the
16 companies and used the companies' assets for their own personal
17 expenses and I'm referring to language in United States v.
18 Peters, which I've already given the cite for. So, those are
19 my findings with respect to the guidelines, forfeiture, and
20 restitution.

21 Before I impose sentence I want to hear from counsel
22 and anybody else who wishes to speak, including the defendants.
23 So we'll go in the order of indictment.

24 Ms. Shevitz, I've read your submission and
25 Ms. Stafford's. Very thorough. About 70 pages. Very long.

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1 I've read it all. But I'm happy to hear anything else you'd
2 like to say today.

3 MS. SHEVITZ: I have nothing to add, Judge.

4 THE COURT: All right. Mr. Cohn.

5 MR. COHN: Well, briefly, your Honor.

6 I note, as I think I said in the past, in my
7 submission that the guidelines from the standpoint of
8 sentencing for you seem to be not terribly important. You
9 imposed a sentence under 3553 that was 75 percent of what the
10 guidelines authorized.

11 THE COURT: For Mr. Tanaka. That's right.

12 And I think I explained myself before which is that
13 this was not -- that the sentencing guidelines make no
14 distinction between a fraud that says you want to buy
15 beachfront and then sells you property in the Everglades, you
16 know, swamp land and then you run off to Mexico with the money;
17 or a Ponzi scheme where the thing has to crash inevitably.
18 This I don't think was that kind of a fraud. But there were
19 victims and there were losses.

20 MR. COHN: I understand, your Honor. And please don't
21 take that comment that I just started with as criticism. In
22 fact, I'm applauding the Court for saying -- for doing
23 something which harsher judges might have done otherwise, let
24 me put it that way.

25 So, I start with the proposition that Ms. Shevitz has

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1 dealt with economic issues in a much more thorough way than I
2 was capable of given that she was involved in the SEC
3 litigation and I was not and I saw nothing under the Criminal
4 Justice Act which would have allowed me to expend the kind of
5 money to participate in that had I even applied for you to let
6 me. But, the question occurs to me, as somebody who's been
7 around for a long time, is having given that kind of
8 consideration under 3553(a) in the past, and imposed a
9 five-year sentence when you could have imposed a 20-year
10 sentence and been safe on appeal, why you should cut it now,
11 which I'm urging.

12 I'm urging that Mr. Tanaka be released essentially to
13 do what he could have done -- and the government has seemed to
14 make some hay somehow on the fact that restitution, or
15 disgorgement, or giving money back, or whatever hasn't happened
16 over a ten-year period. And seems to imply that Mr. Tanaka
17 could have done that, although I'm not exactly sure how, given
18 that he was in jail, where a receiver is appointed, and
19 everybody was going forward with their hand out and saying give
20 us more money than we put in, all of which they're entitled to
21 put forward, I guess. But the fact is that that money in
22 the Amerindo accounts is still sitting there.

23 The receiver seemed to have said that there's plenty
24 of money to make full restitution at the 2005 rates. And maybe
25 there is and maybe there isn't quite enough. But certainly if

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1 the accounts are not managed properly there will be less money
2 than if they are.

3 I'm not suggesting that people shouldn't want their
4 money now. But, I'm also suggesting that, particularly for the
5 smaller investor but even for the larger ones, that getting the
6 full amount with additional interest, if the 3.25% you know
7 holds water, is something that they would want to pursue
8 otherwise. Unfortunately, as my standing here represents a
9 finding of the Court, Mr. Tanaka's assets have been wiped out
10 since otherwise he would have had a private counsel. And you
11 ruled that he's indigent for the purposes of assigning counsel.
12 But I think what I suggest -- you know when I started to write
13 it, it seems that I had great temerity in saying
14 three-and-a-half years is enough already. But I think it is.
15 If, indeed, you're to order that he assists the receiver in
16 finally coming to a conclusion and managing the accounts so
17 that in an orderly way restitution or whatever you want to call
18 it -- whether you want to call it disgorgement, whether you
19 want to call it repayment, I don't really care what you call
20 it. I care that the money appears to be there to pay these
21 people and they should get the money at the earliest possible
22 date in the way most calculated to give them the most money.

23 It seems to me that given that Mr. Tanaka only has
24 about a year left to serve in an institution since in about a
25 year he'll be put into what used to be called a halfway house,

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1 that that balances out for a reason that the Court has an
2 opportunity to do something which jail is not designed to do.
3 Jail here is sheer punishment, it seems to me. I think the
4 Court's comments on the deterrent value, given what people in
5 the financial industry seem to do, has very little value. And
6 what it is, is that it's punishment. And you're entitled to
7 punish a miscreant for his misconduct.

8 But there is another issue that we should do. And
9 we're starting to recognize it in other areas of law like in
10 drugs and rehabilitation as opposed to jail. I'm not
11 suggesting that Mr. Tanaka even needs rehabilitation or not.
12 But he can assist getting the money back to the people in the
13 most orderly way and the most complete way.

14 Leaving him in jail while they sell out the accounts
15 that they're seizing, at great loss, leaving big gaps in
16 restitution makes no earthly to me. It seems to me that if
17 we're concerned about the victims, then there's a balance to be
18 struck between getting them the most money the fastest way
19 possible or leaving them holding the bag on something, for
20 something they'll never see because there are no other assets
21 to seize.

22 So, what I am suggesting to the Court -- and I realize
23 that it's radical -- is that the Court essentially sentence him
24 to time served and put him on postrelease probation essentially
25 with strong conditions on his cooperation in managing the

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1 account and making sure that the money goes to the victims in
2 the most efficient way and most complete way. So that's why
3 I'm suggesting that to the Court. And I hope the Court will at
4 least consider it.

5 THE COURT: Thank you, Mr. Cohn.

6 Government wish to be heard?

7 MR. NAFTALIS: Just briefly, your Honor. I'm not
8 going to retread over the defendants' conduct in this case.
9 Your Honor is well aware of it. It was extensively argued at
10 the original sentencing. I want to instead address the
11 defendants' postconviction conduct and why it supports the
12 reimposition of the Court's original sentence.

13 I appreciate what Mr. Cohn is saying. I think it's --

14 MR. COHN: I'm just standing so I can hear him. He's
15 facing the Court.

16 THE COURT: Let's make sure you're using a microphone
17 so you can be heard. In fact, maybe even that one would be
18 better. I think it's easier for the defense table to see you
19 and that that mic I think is a little --

20 MR. COHN: I'm sorry to interrupt but I have aged ears
21 as they are.

22 THE COURT: Well this is a beautiful courtroom but the
23 acoustics are challenging so we have to do what we can. So, go
24 ahead.

25 MR. NAFTALIS: Nice perspective, your Honor.

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1 I appreciate what Mr. Cohn is saying and the
2 hypothetical that the defendants would like to help where they
3 can. But this is the very same claim that Tanaka advanced at
4 the original sentencing and I think what the Court took into
5 account at that time: That he would do what he could to get
6 the defendants -- the victims their money back. And this has
7 been a refrain for some five years now.

8 But just because you say it doesn't mean it's true.
9 And if you look at the defendants' postconviction conduct, in
10 particular Mr. Tanaka, they have done nothing to aid the return
11 of money to investors. The government cites an e-mail sent by
12 Mr. Tanaka from prison where he says, this is in connection
13 with giving the Mayers money back, who are owed ten plus
14 million dollars, whose house is being foreclosed upon, "These
15 people, the Mayers, will whittle -- whittle, moan, cry and wail
16 for the almighty shekel. I'm sure their grandmother, who
17 accumulated this largess for their granddaughters by way of her
18 Puerto Rican department stores, would not be very proud to hear
19 of such spendthrifts malingering in the family tree. My gut
20 feeling is to just let them fester."

21 So, your Honor, what Mr. Cohn is saying, it's nice to
22 hear. But in practice it's just not true. Mr. Tanaka and
23 Mr. Vilar have repeatedly tried to obstruct the return of their
24 clients' monies and they should get no credit or not be
25 involved in any process here at this present time.

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1 I think we see -- we've seen what has happened.
2 They're not going to participate meaningfully in any way. And
3 all they want to do is obstruct the return of investor funds.

4 So, in light of that, they should be -- the original
5 sentence should be reimposed because of their postconviction
6 conduct. Their inability to say the most basic words to the
7 victims like the Mayers, Lecube-Chavez who is literally
8 penniless, the most basic words that, "I'm sorry." Instead,
9 they blame the government repeatedly for their predicament.
10 They blame the court for their predicament. They blame every
11 attorney who has represented them for their predicament rather
12 than saying: I never invested a penny the way I was supposed
13 to. I never gave my clients their money back when they asked,
14 parens, even though there was -- now they claim money in the
15 accounts or sufficient money. And even after conviction, they
16 have never done anything to help the return of investor funds.
17 They have thrown up roadblock, after roadblock.

18 And that's what I want the Court to focus on here,
19 your Honor, is that fact: Why the reimposition of sentence of
20 the original sentence is important, because the defendants have
21 in no way accepted responsibility for their actions, said I'm
22 sorry, or in any way helped the process. The convictions are
23 final and have been so and they still fight tooth and nail to
24 prevent their victims from getting their money back.

25 Unless the court has any other questions, your Honor,

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1 this has been extensively briefed and you, of all people, know
2 the record better than anyone in this courtroom and know
3 defendants' crimes and their conduct. So I think with that,
4 we'll rest on our papers.

5 THE COURT: All right. Ms. Shevitz.

6 MS. SHEVITZ: May I just be heard for one minute on
7 never doing anything to get the money back. We made a proposal
8 for a payout while the defendants were in jail previously in
9 July 2002. It was along the same lines that Mr. Gazes has
10 adopted two years later. The amounts we said were subject to
11 checking with the Amerindo records, which was what Sharon Levin
12 used. These defendants have had no ability to do anything to
13 accomplish the payout. The government's statement that they
14 are obstructing it is completely untrue and unfair. We have
15 been trying in both cases to get the money paid back, to get a
16 valuation that is fair and to get a process. We and Julian
17 Friedman for Mr. Marcus suggested that the magistrate judge be
18 used or anything else. That was in January 2012 after the
19 Court convened a joint combined matter. We made these
20 suggestions. Everybody else has been saying no. And there is
21 absolutely not one thing that either defendant could have done
22 differently.

23 At the last sentencing your Honor asked about that,
24 couldn't anything have been done. And Mr. Colton said, which
25 I've quoted repeatedly from the sentencing transcript, "No,

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1 because I intuited that the SEC wouldn't allow them to manage
2 anything," and that's exactly what happened.

3 On June 1, 2005 the SEC took them out of business of
4 being able to do anything and has been standing in the way of
5 getting -- letting them do anything. Whatever Mr. Tanaka said
6 previously was in regard to a hardship request. We don't want
7 hardship requests. We want to get the money back to the
8 investors. There is no reason to stand in the way. We wanted
9 to show from the beginning -- I wasn't there -- but they wanted
10 to show that the money was there. There has been no possible
11 way to do this. And our proposal of July 2012 was the first
12 proposal that was rejected for no reason by the SEC only to
13 have Mr. Gazes, in his first iteration of what should be
14 returned, come back with substantially the same things except
15 he omitted some of the investors who were on Sharon Levin's
16 list. Our payout proposal came from Sharon Levin's list.
17 That's where it came from.

18 I just have to object to that because the defendants
19 have been in no way obstructive of this and I ask the Court to
20 review the record of this, to be absolutely fair about this.
21 If we could do something, we would do something to get that
22 money back.

23 Could Mr. Colton have done something? Maybe. Maybe
24 he could. And he said in that sentencing transcript that we
25 would have done something differently. I think he and Mr. Litt

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1 decided that it wasn't worth doing -- I don't know what they
2 decided. The point is, these men stand sitting here today
3 before you to be sentenced could do nothing about it once it
4 was frozen. And it remains frozen. And nobody will say let's
5 unfreeze it. Let's have JP Morgan pay interest. We can't do
6 anything. We can't do anything. Their hands have been totally
7 cuffed behind them.

8 THE COURT: Okay. Thank you. I mean I guess I will
9 give you a chance to respond, Mr. Naftalis, if you want.

10 MR. NAFTALIS: No, thank you, your Honor.

11 THE COURT: All right. I know that there are a couple
12 of victims who wish to be heard. Now is the time for that.
13 Who are --

14 MR. NAFTALIS: Your Honor, in the courtroom are Lisa
15 and Debra Mayer. And your Honor has Ms. Lecube-Chavez's letter
16 to the Court.

17 THE COURT: I think there was some indication that it
18 should be read aloud. Is there --

19 MR. NAFTALIS: That was the request. It's obviously
20 your discretion. She just asked that it be read aloud.

21 THE COURT: I don't think I need it read aloud. I
22 certainly have read it. It's part of the record. So I think
23 that that's sufficient but if someone disagrees certainly I'm
24 happy to hear. I mean no disrespect to Ms. Lecube-Chavez. If
25 she were here, she would have the right to speak. She's not

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1 here. I think the letter is part of the record and certainly
2 has been read by me.

3 MR. NAFTALIS: Yes, your Honor. So your preference,
4 or the witness's preference.

5 MS. SHEVITZ: I do want to hand up to the Court with
6 regard to Ms. Lecube-Chavez two pieces of 3500 material that
7 may also be read where in 2005 and 2007, speaking of not being
8 able to do anything, Ms. Lecube-Chavez contacted the
9 government. First Cindy Fraterrigo and then Edward Gallashaw.
10 I guess he's also a postal inspector. Saying: I'm Graciela
11 Lecube-Chavez, one of the victims. Two years she asked for the
12 government to help get her money back and that's while it had
13 been frozen. So I don't have extra copies of this. But 3520-6
14 and 3520-13. Because they bear on how the, quote,
15 victimization perpetuated.

16 THE COURT: Do you want to hand those up?

17 MS. SHEVITZ: Yes.

18 THE COURT: You can give them to my law clerk. He'll
19 meet you halfway.

20 So I have two Ms. Mayers. Whatever order you prefer.

21 Go over there to the microphone over there. If you
22 could just state your name and spell your name so the court
23 reporter has it down. And then just remember that the
24 acoustics here are not great and everybody has a tendency to
25 talk too fast in court, myself included. So keep your voice up

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1 nice and loud and speak nice and slow.

2 MS. DEBRA MAYER: Thank you, your Honor. My name is
3 Debra Mayer. And thank you for having us speak here today.

4 THE COURT: Good morning, Ms. Mayer.

5 MS. DEBRA MAYER: Good morning. I wrote some things
6 down and put them in sequence in order to speak here today.

7 I was with my father on February 2, 2014 when he took
8 his last breath.

9 On Friday, January 31, 2014 he asked me: What has the
10 judge said today? I answered: Nothing new today, dad.

11 He tightly shut his eyes and cringed. He left this
12 world with excruciating and agonizing mental torment that
13 exasperated the physical stress.

14 For example, in 2008 he was in desire need of complex
15 dental and gum surgeries in order to eventually obtain proper
16 fitting dentures. We could not provide the appropriate medical
17 care he so desperately needed. As time went on, he could no
18 longer enjoy his favorite foods. With just a few teeth and
19 nutritional deficiencies setting in, it translated into further
20 physical deterioration. The quality of life was greatly
21 diminished, a deep depression set in along with a severe mental
22 torture that accelerated his death.

23 My sister, Lisa, and I live with acute stressful
24 trauma. We live with the threat of being evicted from our home
25 along with utilities being shut off. We have incurred

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1 tremendous debts that haunt us daily. Thanks to the incredible
2 benevolence of a few friends and family, we feel extremely
3 grateful. Alberto Vilar and Gary Tanaka have had more than
4 ample time to reconsider their actions and the painful
5 consequences they have caused others.

6 Awhile ago I read a statement among the documents from
7 Mr. Tanaka that said something to the effect, which was just
8 said but I'll repeat it: Let the Mayers fester. They scream,
9 wail, moan, and scamper for every shekel.

10 Well, may I remind them that every hard-earned shekel
11 contributed to their business. Every hard-earned shekel they
12 pilfered to fund their exaggerated, greedy needs and lifestyles
13 all along with deceit, lies and ill wishes towards us. It came
14 back to bite them.

15 Your Honor, I pray for fairness, truth, and justice.
16 Thank you very much, your Honor.

17 THE COURT: Thank you, Ms. Mayer.

18 MS. LISA MAYER: Judge Sullivan, good morning. My
19 name is Lisa Mayer.

20 The last time my father stood before you in the
21 previous sentencing he said: Alberto Vilar and Gary Tanaka
22 were aloof, dishonest, and deceitful. To this day, your Honor,
23 Alberto Vilar and Gary Tanaka continue to lie with no remorse.
24 After breaching our GFRDA contract and defaulting in 2003,
25 Vilar, Tanaka, and his wife, Renata, threatened us and lied to

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1 us and cheated us. They tried to browbeat us into submission
2 to their way or the highway. And now we know that they had the
3 money to pay us back every dollar they owed us. Instead, they
4 chose, out of greed, to fund their opulent lifestyles. And
5 they continue to lie through their counsel Vivian Shevitz by
6 stating that we had reached a repayment agreement
7 with Amerindo. No agreement was ever reached. Ever.

8 In February, 2004 I flew to London with my sister and
9 our adviser to meet with Gary and Renata Tanaka. We insisted
10 that a full payment was required along with our condition of
11 collateral. There was no agreement reached at that time except
12 for reduced and incomplete interest payments. Again, we were
13 lied to and told that this was a temporary measure.

14 In September 2004 Vilar sued us for defamation in the
15 State Supreme Court of New York.

16 The following year, in March of 2005 Vilar and
17 Tanaka's lawyer Toner sent us some e-mails inviting us back to
18 London to see if we could reach an agreement. We responded in
19 April 2005 by saying that a trip to London would be useless
20 unless accompanied by an escrow account of one million in
21 collateral and an agenda for the meeting. No collateral ever
22 materialized. No agreement was ever reached. One month later
23 on May 26, 2005 Vilar and Tanaka were arrested by federal
24 agents.

25 Your Honor, we just learned by the sentencing brief of

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1 Vivian Shevitz that in June of 2005 clients of Amerindo known
2 as Dextra were paid in full in England by Renata Tanaka from
3 her personal stash of money. As Renata was a person who dealt
4 with clients, someone should investigate the source of her
5 funds used to redeem clients.

6 Your Honor, Alberto Vilar and Gary Tanaka are arrogant
7 liars and cheaters. They prevented the return of our money for
8 so many years, inflicting pain and suffering on us. We have
9 enormous debts that accrue and compound daily interest. We
10 have experienced hunger, anguish and depression. Fortunately,
11 there are wonderful, kind individuals who helped us survive.
12 As we found ourselves with no power after hurricane Sandy and
13 no money for food or gas, one kind person emptied all her
14 kitchen cabinets and showed up with groceries to our home.
15 Other volunteers showed up and showed us love and kindness.
16 Even as our dad deteriorated and I rode more times than I can
17 remember by ambulance to the hospital, he eagerly awaited all
18 news from the court. Only when reading to him the disgusting
19 letters from Shevitz would he cry. You must persevere he told
20 us. We loved our father deeply and will honor his life with a
21 successful outcome he so deserved and wished for.

22 Thank you, your Honor.

23 THE COURT: All right. Thank you. Thank you very
24 much.

25 As I said before, the defendants themselves have the

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1 right to address the court. Not required to, but certainly
2 have a right to and are welcome to.

3 Mr. Vilar, is there anything you'd like to say before
4 I impose sentence?

5 DEFENDANT VILAR: No, your Honor.

6 THE COURT: Mr. Tanaka, is there anything you'd like
7 to say before I impose sentence.

8 DEFENDANT TANAKA: No, your Honor.

9 THE COURT: Well, let me tell you the sentence that I
10 intend to impose and my reasons for it. This is an atypical
11 sentencing in a lot of ways because we had done this once
12 before and I spent a fair amount of time discussing my reasons
13 for the sentence I imposed then. I've told you and others here
14 today what the different factors are that I have to consider
15 and these are things that have to be balanced against each
16 other and are often in tension with each other. Last time I
17 sentenced Mr. Vilar to nine years and Mr. Tanaka to five years
18 which was well below the sentencing guidelines of 17-and-a-half
19 to 22 years. And I did that for a variety of reasons, one of
20 which was, as I said to Mr. Cohn a moment ago, my sense was
21 that the sentencing guidelines made no distinction and still
22 make no distinction between various types of fraud and -- that
23 make no distinction between a pure Ponzi scheme which would
24 collapse of its own weight where no funds were ever invested or
25 a scheme that was sort of a con artist scheme to take money

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1 from someone and then flee or disappear before they knew what
2 hit them.

3 This was not that kind of a scheme. Mr. Vilar and
4 Mr. Tanaka were successful investment advisers who built
5 careers and companies that did much good. I don't think
6 there's any question about that. They had skill. They had
7 ability. And they were able to help create wealth for their
8 clients who were fabulously successful, certainly for a time.
9 And I credit that. They had no prior criminal histories. Many
10 people made a lot of money because of stocks that were picked
11 by Mr. Vilar and Tanaka. So I recognize that. And I think
12 that's a reason why a sentence below 17-and-a-half to 22 years
13 is appropriate. I'm just sort of reploting old ground, but I
14 think that's true.

15 I've also looked at the individual lives of these men.
16 So, Mr. Vilar, in his case I commented on him being a
17 complicated person. I think that's true. I don't think it's
18 any less true today than it was on the day that I sentenced him
19 in 2010; a man capable of great generosity who has helped
20 individuals and institutions in very meaningful ways from his
21 own wealth which was considerable. I don't think there's any
22 dispute about that. I've read the letters that people attest
23 to that kind of generosity and charity. A man capable of charm
24 and a man with, you know, taste and culture and all the sorts
25 of things that people associate with what is good in life. And

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1 I give him credit for that. And taste and culture are
2 important.

3 Mr. Tanaka is a person who began his life in a
4 internment camp under the worst of circumstances in a part of
5 American history that is not a proud part of it. He was born
6 there. His parents were sort of stripped away from everything
7 they knew and owned and put in a camp for the duration of the
8 war. His mother has written a very moving letter. She wrote
9 another letter previously. Mr. Tanaka's wife writes very
10 movingly in a very long letter about Mr. Tanaka, about his
11 illnesses, about his spirits, about his complex personality and
12 what separation has meant for Mr. Tanaka's family, for his
13 child, his boy who is now 14 whom he hasn't seen in years.
14 I've I considered all of that before and I took that certainly
15 into account. And it was what led me to conclude that the
16 sentence that I imposed of nine and five years was appropriate.
17 And I don't think these factors, these 3553(a) factors that
18 were discussed in 2010 have changed that much. So I certainly
19 intend to impose a below-guidelines sentence.

20 Nevertheless, I certainly don't think a lower sentence
21 is appropriate now. In fact, considering all of the factors
22 and all of the circumstances in this case I believe that a
23 higher sentence or really less of a guidelines reduction is
24 necessary and appropriate. And I want to make this very clear.
25 This is a resentencing. But I certainly have the authority to

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1 impose a higher sentence where there is "objective information
2 in the record justifying the increased sentence." That's
3 United States v. Bryce, 287 F.3d 249 at 256 from the Second
4 Circuit. I certainly can't hold it against the defendants that
5 they appealed and I certainly don't. They have -- you have the
6 right to appeal. You have the right to defend yourselves in
7 civil cases. You have the right to protect your legal rights.
8 Of course you do. But the circuit has held that a higher
9 sentence on resentencing is appropriate where the defendant
10 engages in anti-social conduct following the initial sentence.
11 And I think that -- that's the same case, the Bryce case -- but
12 I think that that is what happened here.

13 At the last sentencing I was very influenced and
14 affected by what each of you said in open court and in your
15 submissions, that you really wanted to get investors paid. To
16 give a couple of examples Mr. Vilar said that "I deeply regret
17 any inconvenience that our 14,000 clients might have suffered.
18 Fortunately, there are only five victims, and I am 95 percent
19 confident that they will be paid and that they will not have
20 been lost anything." That's the sentencing, transcript of the
21 sentencing, 60 lines 5 through 8.

22 Mr. Colton who was then the attorney for Mr. Tanaka
23 stated that Mr. Tanaka had a "Commitment to get these people
24 paid." And he has "spearheaded the effort to get the Mayers
25 paid." That's the transcript at 107 to 108.

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1 Mr. Tanaka himself said "Our private clients for
2 whatever reason have had their money tied up for five years or
3 so and I feel that they definitely are victims." That's the
4 transcript at 139, line 24 to 140, line 1.

5 Mr. Tanaka continued, "I would like to get into trying
6 my best to restore client assets." Page 142.

7 And again, "I hope to get the opportunity in the near
8 term, again, to restore these client assets because I do feel
9 deeply responsible." That's the transcript at page 144.

10 Since then, I have to agree with the government, that
11 the defendants' conduct has seemed designed at every step to
12 slow down the distribution process and to punish the investors,
13 particularly those who testified against you at trial. Those
14 words that were made at the sentencing in 2010, which I
15 credited, I think have been demonstrated to be false.

16 Just a few examples of that. You refused to consent
17 to allowing a distribution to investors in the civil case back
18 in January of 2012. Ms. Shevitz, on your behalf, submitted
19 letters refusing that consent. The government submitted
20 letters saying that you were obstructing any attempts to get
21 early payment. This is in the civil case, the docket 177, 187,
22 190, and 187. At the hearing I held with Judge Swain on
23 January 10 of 2012 there was a lot of talk about saying you
24 wanted to get investors paid but you shot down every idea that
25 was proposed with the inevitable result that nothing happened.

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1 That's the transcript from January 10 on the joint conference,
2 page 15, lines 13 to 21, 20 -- page 20 lines 13 to 19.

3 You've made numerous attempts to stay the civil case.
4 That's docket number 275.

5 You've opposed the appointment of a receiver
6 insisting, what I can only say preposterously, that you be
7 given control of the funds or that you be allowed to chose the
8 receiver. This was a point made as recently as April 14 in
9 Mr. Cohn's sentencing memorandum at page four.

10 You've refused to cooperate with the receiver at every
11 turn, have consistently endeavored to slow him down and delay
12 the return of assets to the investors. I'll point to the
13 hearing of October 25 in the civil case, line -- page 15, line
14 22 to 18, line 4; page 22, lines 5 through 23, line 2; page 27,
15 line 15 to page 28, line 5.

16 You've written letters to investors that seemed
17 designed to confuse them and to undermine the legitimacy of the
18 process. Those letters are Exhibits B and C to the
19 government's sentencing submission.

20 You at various times insisted that you were the true
21 owners of the assets in the funds contrary to all the evidence
22 and to your own statements at the 2010 sentencing.

23 And in some ways worst of all I think you have
24 consistently refused hardship distributions to the Mayers or
25 any other victims even though you knew that the Mayers have

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1 really been left in very difficult financial circumstances.

2 I'll point to the civil case docket number 360, 186, transcript
3 of the January 10 conference at page 54, line 22 to 55, line
4 17; as well as page 58, lines 8 through 11; 61, lines 14
5 through 24; page 62, lines 21 to 24; and page 63, lines 11 to
6 25.

7 I think your attitudes towards the Mayers has been
8 exactly what Mr. Tanaka said in the communication that was
9 quoted by the government here today, which is also included as
10 Exhibit A in their submission, the Mayers should just fester.
11 You wanted them to do what Ms. Lecube-Chavez testified at trial
12 you did to her, which is to turn them, like you turned her,
13 into a beggar for their own money.

14 I think that's unfair. I think it's unjust.
15 Dr. Mayer came to the last sentencing. He talked about the
16 harm that you had done to him. And it seems to me that you've
17 done everything in your power since to make sure that he didn't
18 get paid before he died. He died earlier this year, still
19 waiting for justice. That was described by the Mayer sisters,
20 still waiting a return for his money, earned by him and others,
21 I gather, but certainly his money. Ms. Colburn is also dead.
22 The other victims are five years older and no better off.

23 Ms. Lecube-Chavez in her letter to the court I think
24 well captures the consequences of that delay and the reneging
25 of the promises made by Mr. Tanaka and Vilar at the sentencing.

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1 She writes "After years living as the victim in the money
2 dealings of a trusted professional like Mr. Alberto Vilar, I
3 find myself with 89 years of age, facing diabetes and
4 arthritis. I'm a proud woman, humble and grateful, who planned
5 for a simple future, never thinking that a can of soup would be
6 my dinner, unable to pay for medicine I need, or forced to
7 cancel dental work for lack of funds."

8 Those are the real consequences of this scheme. And
9 those are consequences that I think have been exacerbated over
10 the past five years since 2010 when the defendants asserted
11 their determination to make sure that investors like
12 Ms. Lecube-Chavez would be paid.

13 Now the defendants and their counsel are quick to
14 blame the government, the court, past lawyers, the receiver,
15 the SEC, and the victims themselves for these delays. I think
16 that's dishonest. I think it shows lack of remorse. I think
17 it shows their continued bad faith and their continuing desire
18 to inflict pain on those who dare to challenge them and dare to
19 bring them to justice. I think that's consistent with what
20 took place throughout the scheme, which I commented on at the
21 last sentencing, that this was a scheme that was basically
22 designed to take advantage of unsophisticated people, people
23 who could be intimidated, people who could be pushed around or
24 stonewalled. The institutional investors didn't get treated
25 this way. The sophisticated investors who would push back and

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1 cry foul quickly weren't treated that way. It was a certain
2 type of investor who they thought that they could get over on
3 while their economic circumstances were dire. I think that was
4 part of the scheme. I think that they're still doing that
5 today against victims that they now are acting vindictively
6 toward. That's I think the only conclusion I can draw from
7 these facts.

8 Now I don't suggest that all of the delay is
9 attributable to the defendants. The wheels of justice
10 sometimes move slowly. I don't suggest for a moment that this
11 is entirely attributable to the defendants, but I do think
12 they're responsible for much of it. I think it was
13 intentional. I think it was designed to inflict pain and
14 hardship on those who testified against them. I think it's
15 been in direct tension with the pronouncements made by the
16 defendants that they would do everything in their power to
17 repay their investors. I can't ignore that. I won't ignore
18 that.

19 In 2010 I sentenced Mr. Vilar to nine years, about
20 half of what the sentencing guidelines called for. I sentenced
21 Mr. Tanaka to five years, which was about three-quarters below
22 the bottom end of the sentencing guidelines range.

23 The defendants' conduct since then persuades me that
24 such a reduction was unwarranted, or put another way, that
25 their subsequent conduct justifies a higher sentence; that the

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1 defendants words at sentencing were false and designed to
2 mislead the Court and the victims; that the defendants have no
3 remorse and they are, in fact, determined to act vindictively
4 towards those who testified against them at trial.

5 So for that reason I intend to sentence Mr. Vilar to
6 120 months or ten years. That's a year more than what I
7 sentenced before. I think I would be justified in going much
8 higher, but I don't want there to be the appearance of
9 vindictiveness on my part even though I think I've rebutted
10 that amply in the record here. I think it's important
11 nevertheless to send a message to the victims that I haven't
12 been oblivious to this and that this is something that has to
13 be acknowledged.

14 So I intend to impose a sentence of ten years on
15 Mr. Vilar and six years on Mr. Tanaka, in each case a year more
16 than what I imposed last time.

17 In Mr. Vilar's case it will be sentences of 60 months
18 on Counts One, Four, Five and Twelve which are capped at five
19 years, and 120 months on Counts Two, Three, Six through Eleven,
20 all to run concurrently.

21 For Mr. Tanaka I'm going to impose a sentence of five
22 years on Counts One and Four, which again are capped at five
23 years, and six years on Count Three, again, to run
24 concurrently.

25 In addition to those terms of imprisonment I will

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1 impose a three-year term of supervised release for each
2 defendant with the same terms and conditions I've previously
3 imposed before.

4 With respect to the fine, previously I imposed a very
5 modest fine. I think for the reasons I've articulated here
6 today that a higher fine is appropriate. I think more
7 importantly with respect to a fine, I think that at the last
8 sentencings the defendants each said or argued that they had
9 virtually no assets. They are now claiming the residual amount
10 in the Amerindo accounts which they claim could be worth
11 millions or tens of millions of dollars and that may, in fact,
12 be true. I think those accounts have not yet been fully valued
13 and so there may be a remainder. To the extent that millions
14 of dollars or tens of millions of dollars fall to these
15 defendants, then I think the higher fine is warranted,
16 particularly in light of the conduct that I talked about today.
17 So, in light of that, I intend to impose a fine of \$10 million
18 on top of the restitution and forfeiture that I've already
19 articulated.

20 In addition, then, I will impose a special assessment
21 totaling \$1,200 for Mr. Vilar, one hundred dollars on each
22 count; and \$300 on Mr. Tanaka, one hundred dollars on each
23 count.

24 So, that's the sentence I intend to impose. I should
25 state that I find these sentences appropriate. They're well

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1 below the guidelines. But I think that a lower sentence would
2 not be appropriate in light of all of the objectives of
3 sentencing set forth in Section 3553(a) of Title 18.

4 I would also note for the record that I would reach
5 this same sentence even if the guidelines range were lower, if
6 the losses to -- that I've attributed to Cox and Colburn were
7 not included in the loss amount, and even if the enhancement
8 for role and oversees activity would not apply.

9 The guidelines are a guide. They're a tool. They're
10 advisory. But ultimately on the entire record I think this is
11 an appropriate sentence. And if my guidelines calculations
12 were to be deemed incorrect in any way, I can say that candidly
13 it wouldn't have made a difference for purposes of the sentence
14 that I intend to impose.

15 So is there any legal impediment to my imposing such a
16 sentence? Ms. Shevitz?

17 MS. SHEVITZ: Let me think for a minute.

18 THE COURT: While you're thinking I'll ask the same
19 question to Mr. Cohn.

20 MR. COHN: No.

21 THE COURT: I'll ask the government. Any legal
22 impediment to my imposing that sentence?

23 MR. NAFTALIS: No, your Honor.

24 THE COURT: Ms. Shevitz.

25 MS. SHEVITZ: I have asked for hearings on certain

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1 issues and your Honor has said no.

2 THE COURT: Right.

3 MS. SHEVITZ: So that being said and preserving my
4 objections to that, I guess there is no other specific legal
5 reason to -- for you not to impose a higher sentence except
6 under North Carolina v. Pearce and other cases of that nature.

7 THE COURT: So then Mr. Vilar let me ask you please to
8 stand.

9 Mr. Vilar, having presided over your trial at which
10 the jury returned a guilty verdict I now sentence you as
11 follows. I sentence you to a term of incarceration that will
12 total ten years. And it will be accounted as follows: Five
13 years each on Counts One, Four, Five and Twelve of the
14 indictment, those counts have a five-year maximum; as well as
15 ten years on Counts Two, Three, and Six through Eleven, all to
16 run concurrent.

17 In addition, I impose a three-year term of supervised
18 release to include the terms and conditions that were set forth
19 in the presentence report that I already stated on the record.
20 I'm happy to restate them if anybody wants me to. But if you
21 don't think it's necessary, I won't.

22 Do you have a thought on that Ms. Shevitz?

23 MS. SHEVITZ: I'm sorry. What?

24 THE COURT: For the terms and conditions of supervised
25 release. I'm imposing the exact same terms I imposed before.

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1 MS. SHEVITZ: Having not been at the prior sentence
2 and not focused on them, yes, I'd like to hear them again.

3 THE COURT: Let me just get them here and I'll read
4 them.

5 So, the conditions of supervised release will include
6 the following mandatory standard and special conditions.

7 First, you're not to commit any additional federal,
8 state, or local crimes.

9 You shall not possess a firearm or destructive device
10 of any kind.

11 You shall not possess or use drugs of any kind.

12 In addition, I'm going to impose the following special
13 conditions. First, that you shall provide the probation
14 officer with access to any requested financial information.
15 You shall not incur new credit charges or open additional lines
16 of credit without the approval of the probation officer.

17 You shall submit your person, your residence, your
18 place of business, your vehicle or any other premises under
19 your control to a search on the basis that the probation
20 officer has reasonable belief that contraband or evidence of a
21 violation of the conditions of supervised release may be found.
22 That search must be conducted at a reasonable time and in a
23 reasonable manner but failure to submit to a search may be
24 grounds for revocation. And the defendant shall inform any
25 other residents that the premises that he shares with them may

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1 be subject to a search pursuant to this condition.

2 I'm not going to require drug testing for Mr. Vilar.
3 I don't think he possesses any risk of drug use.

4 There are 13 standard conditions that are imposed in
5 virtually every case involving supervised release. I will
6 impose those here as well. And I will order that Mr. Vilar be
7 supervised in the district of his residence. All right.

8 As I said, I'm going to impose a \$10 million fine
9 joint and several with -- well, a \$10 million fine, excuse me.

10 I'm going to impose restitution in the amount that I
11 announced before to each of the victims. I'll issue a separate
12 order for restitution but I've announced what those amounts
13 are.

14 I'm also going to order forfeiture in the amounts that
15 I've already recited as well as a special assessment of \$1200,
16 one hundred dollars for each count of conviction.

17 So that's the sentence of the Court.

18 Please have a seat.

19 MS. SHEVITZ: And we have asked for the recommendation
20 of designation to the Otisville camp.

21 THE COURT: I will make that recommendation. It's
22 only a recommendation. I can't order the Bureau of Prisons to
23 move defendants or prisoners to any particular place but I'll
24 certainly make that recommendation and hopefully they can
25 accommodate it.

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1 MS. SHEVITZ: Or if not close to this.

2 THE COURT: Close to the New York area.

3 MS. SHEVITZ: Yes.

4 THE COURT: So I'll refer -- I'll specifically ask for
5 Otisville's camp or such other facilities as are as close as
6 possible to the New York area.

7 MS. SHEVITZ: But that of course is preferred. Thank
8 you.

9 THE COURT: Mr. Tanaka, would you please stand.

10 Mr. Tanaka, having presided over your trial and
11 received a guilty verdict from the jury on three of the counts
12 of the indictment, I sentence you as follows.

13 I sentence you to a term of incarceration of six years
14 in total, to be broken down as follows. Five years on Counts
15 One and Four, and six years on Count Three, all to run
16 concurrently.

17 In addition, to that term of imprisonment I also
18 impose a three-year term of supervised release with the same
19 conditions I imposed last time which are the same conditions
20 that I just recited for Mr. Vilar. I'm happy to recite them
21 again if you think it helps.

22 MR. COHN: Not necessary.

23 THE COURT: As I said, I'm going to order restitution
24 for each of the victims in the amount that I previously stated
25 and forfeiture in the amount that I've previously stated as

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1 well as a special assessment of \$300, one hundred dollars for
2 each count of conviction.

3 Are there any recommendations you would like me to
4 make?

5 MR. COHN: Otisville, your Honor, the camp. And in
6 your recommendation I would suggest that you add the reason for
7 it is because of continuing litigation and access to local
8 counsel being the reason for it.

9 THE COURT: I can put that. I don't know if that has
10 any magic effect.

11 MR. COHN: I don't know either.

12 THE COURT: I don't think it does but in fact --

13 MR. COHN: It's like chicken soup, Judge, it can't
14 hurt.

15 THE COURT: I'll mention it but, again, I don't think
16 it's -- it's not up to me ultimately what the Bureau of Prisons
17 does but they generally try to honor these requests and I'll
18 certainly make the request but that's New York for purposes of
19 an appeal, which I'll remind the defendants of their right to
20 appeal this sentence in a moment. But otherwise, Mr. Tanaka
21 has family in California. Once that's done, does he wish to be
22 in California?

23 MR. COHN: No.

24 THE COURT: Okay. So, that's the sentence of the
25 Court. I will make the recommendation. Please have a seat.

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1 MR. COHN: Thank you, your Honor.

2 THE COURT: So let me remind each of you -- is there
3 something you wanted to say?

4 MR. NAFTALIS: Two things, your Honor. One, I just
5 wanted to make sure that your Honor impose the ten million
6 dollar fine as to --

7 THE COURT: Yes. Ten million dollar fine as to
8 Mr. Tanaka. If I didn't say that, I'm sorry.

9 MR. NAFTALIS: Just to clarify as to Mr. Vilar had
10 some objections with respect to hearings that were preserved.
11 Aside from the hearing on Dextra, is there any other hearing
12 that we're talking about?

13 THE COURT: I understood -- you're asking Ms. Shevitz
14 to clarify? Is that what you mean?

15 MR. NAFTALIS: I'm asking your Honor, yes.

16 THE COURT: Well I think my sense was Ms. Shevitz was
17 referring to a trial for forfeiture and a hearing with respect
18 to some -- the loss amounts or loss circumstances but
19 Ms. Shevitz can speak for herself. The hearings you were
20 referring to before?

21 MS. SHEVITZ: Well the other hearing that I think
22 would be appropriate is the hearing on what motivation that you
23 are ascribing a motivation to the defendants to obstruct the
24 return of investor funds. I asked -- I asked for a hearing on
25 that because the reasons for that obviously have driven the

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1 Court to increase the sentence. I think those reasons should
2 be subjected to an adversary analysis and witnesses.

3 THE COURT: Okay. So let me remind the defendants
4 that they have a right to appeal this sentence. You appealed
5 once before. But you have a right to appeal the sentence,
6 certainly. I mean many of the arguments that were appealed
7 with respect to the trial are over. But you certainly have a
8 right to appeal the sentence. If you wish to appeal, you would
9 need to file a notice of appeal within two weeks. So talk to
10 your attorneys about that. That's just a notice, it doesn't
11 require the full briefing, but the notice within two weeks.

12 MS. SHEVITZ: We have notice right here.

13 THE COURT: Okay. In any event, within two weeks.

14 MS. SHEVITZ: Do I hand it up --

15 THE COURT: No. Don't hand it up to me. You should
16 deal with the clerk's office on all of that.

17 Is there anything else that we should cover today?

18 MR. COHN: Nothing.

19 MR. NAFTALIS: No, thank you, your Honor.

20 MR. COHN: I was speaking to Ms. Shevitz.

21 THE COURT: Anything else you'd like to cover today,
22 Ms. Shevitz?

23 MS. SHEVITZ: I would like, if possible, ten minutes
24 to talk to the clients after we're through before the marshals
25 take them back.

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1 THE COURT: Can I -- I defer to the marshals on this
2 just because they have tough restrictions on them. Is that all
3 right? Can the lawyers and clients have a couple of minutes
4 before they're taken back?

5 THE MARSHAL: She can speak to her clients downstairs
6 in the interview room, sir.

7 MS. SHEVITZ: That's very difficult because I have to
8 talk to both of them and you can only have one there at a time.
9 It's impossible to do that there.

10 THE COURT: Could you give them a couple of minutes?

11 THE MARSHAL: Give them five minutes.

12 THE COURT: Thank you very much. I appreciate that.
13 I generally defer to the marshals because they have a tough job
14 and a lot of demands.

15 MS. SHEVITZ: I understand but it just -- the
16 circumstances are not possible.

17 THE COURT: So five minutes. After that then you'll
18 need to probably just take it up with them subsequently either
19 downstairs today or at the institution later.

20 Well let me say this then. It's been a long
21 proceeding. It's been a long case. I don't wish either of you
22 ill. As I've said before, I think there's much admirable in
23 each of you. I imposed a sentence that I think was just. I
24 explained my reasons for it. I don't pretend for a moment that
25 it makes everyone happy. It perhaps makes no one happy. But

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1 my job is to impose a sentence that I think is appropriate in
2 light of all the different factors that I mentioned. I don't
3 believe in hiding the ball or I think I am obligated to tell
4 you my reasons and I've endeavored to do that. I do wish you
5 the best. I wish you health and I wish you happiness and that
6 ultimately you put this behind you and resume your lives with
7 your families and loved ones. So that's my hope for you. But
8 I can't stress enough how there were real victims here. You
9 don't seem to think so. But I think it's just so obvious and
10 so palpable that I hope you will reflect on that. A lot of
11 pain was caused. And it needn't have been.

12 So with that I want to thank all who came here today.
13 I want to thank the marshals and the court reporter. And for
14 the students, maybe we'll just meet in the jury room just so I
15 can say hello and thank you for coming. My law clerk will take
16 you over. Thanks. Have a good day.

17 (Adjourned)

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